Supreme Court of the United States

OCTOBER TERM, 1920.

No. [redacted]11

WILSON SCOTT NORRIS,
Appellant,

against

THE UNITED STATES.

APPELLANT'S REPLY BRIEF

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WILSON SCOTT NORRIS, Appellant, against THE UNITED STATES.	No. 48.

APPELLANT'S REPLY BRIEF.

I.

This action does not sound in tort, as contended by the United States. It is based on the deprivation of rights fixed by statutes. The position taken by opposing counsel that the action sounds in tort (pp. 5 and 6) and that the Court of Claims had no jurisdiction because it is denied jurisdiction of tort claims, we meet by pointing out that the Court of Claims has always taken jurisdiction of actions against the United States growing out of alleged wrongful suspension and removal from office (see the numerous cases digested in Maupin's Court of Claims Digest, pp. 540, 541, 542, 543, covering the first forty volumes of the reports of that court. The succeeding 14 volumes contain a number of such cases and in all of them jurisdiction was taken. We cite a few of such cases decided by that court:

Perkins vs. *United States*, 20 C. Cls. 438;
Turner vs. *United States*, 21 C. Cls. 24;
McAllister vs. *United States*, 22 C. Cls. 318;
Gleeson vs. *United States*, 23 C. Cls. 207;
Parsons vs. *United States*, 30 C. Cls. 222;
Keim vs. *United States*, 33 C. Cls. 174;
Reagan vs. *United States*, 35 C. Cls. 90;
Shurtleff vs. *United States*, 36 C. Cls. 311;
Lellman vs. *United States*, 37 C. Cls. 128;
Wickersham vs. *United States*, 39 C. Cls. 558;
Costello vs. *United States*, 51 C. Cls. 257.

Of the cases above cited, there reached this court on appeal the following:

McAllister vs. *United States*, 141 U. S. 174;
Parsons vs. *United States*, 167 U. S. 324;
Keim vs. *United States*, 177 U. S. 290;
Reagan vs. *United States*, 182 U. S. 419;
Shurtleff vs. *United States*, 189 U. S. 311;
Perkins vs. *United States*, 116 U. S. 483;
United States vs. *Wickersham*, 201 U. S. 390.

In none of those cases did this court decide against the jurisdiction of the Court of Claims, and we have found no case in which this court has denied the jurisdiction of that court over cases involving the alleged wrongful suspension

or removal of officers or employees of the United States.

It may be that the jurisdiction of the Court of Claims was not challenged in any of those cases, but the rule is well established that it is the first duty of the court to see that its jurisdiction is not exceeded, as the consent of parties cannot confer jurisdiction.

Chicago Bur. & Quincy R. R. vs. *Willard,* 220 U. S. 413, at page 419;
Louisville & Nashville R. R. vs. *Mottly,* 211 U. S. 149, at page 152;
Minnesota vs. *Northern Securities Co.,* 194 U. S. 48, at page 62;
Minnesota vs. *Hitchcock,* 185 U. S. 373, at page 382;
Metcalf vs. *Watertown,* 128 U. S. 586, at page 587;
M. C. & L. M. Ry. Co. vs. *Swan,* 111 U. S. 379, at page 382.

This court having taken jurisdiction of cases identical with the case at bar, has settled the question beyond a doubt that the Court of Claims has jurisdiction. It is not contended by the appellant that the Court of Claims has jurisdiction of tort claims, but the instant case does not sound in tort as against the United States. It might well be that if the claimant had sued the Secretary of the Treasury as an individual for wrongful removal, the action would then have sounded in tort. Opposing counsel cites the case of *McGraw* vs. *Gresser,* 226 N. Y. 57, as supporting this contention. The foregoing case was a suit by a discharged employee against the officer who re-

moved him. The court did not hold that if the action had been brought against the sovereignty the same would have sounded in tort. In fact, the contrary is the rule in New York.

Fitzsimmons vs. *City of Bklyn*, 102 N. Y. 536.

II.

No claim is made by the appellant that a case of this kind is predicated on a contract or on the Constitution. In the case of *Crenshaw* vs. *United States*, 134 U. S. 99, cited by opposing counsel, a case appealed from the Court of Claims, it was held that an officer of the army or navy does not hold his office by contract, but at the will of the sovereign power alone. The opinion was written by Mr. Justice Lamar, who, on pages 104 to 108, discussed the subject with clearness and force, concluding (page 108) that whatever the form of the statute, the officer does not hold by contract, but enjoys a privilege revocable by the sovereignty at will. Opposing counsel also cites the case of *Burnap* vs. *United States*, 252 U. S. 512, on appeal from the Court of Claims, but an examination of the opinion shows that Burnap's claim was predicated on statutes, as is the instant claim, and that Burnap was claiming statutory rights and privileges only. This court did not hesitate to take jurisdiction in the Burnap case, where the precise question was the one that is involved here; namely, the right to sue the *United States* for alleged wrongful removal from office. It is true Burnap's claim was denied, but on the ground that he was removed by the proper

appointing authority, and that the statutes had been complied with with reference to preferring charges against him and affording him an opportunity of meeting the same. No such state of facts exists in the instant case. The other cases cited by opposing counsel (pp. 7, 8 and 9) on this branch of argument are not in point. Unquestionably, the Court of Claims has jurisdiction of cases founded upon a law of Congress. (Revised Statutes, §1059; Judicial Code, §145, c. 231; 36 Statutes, 1136.)

Norris held a statutory office. (Act of Mar. 2nd, 1799, c. 23, §2; 1 Statutes, 707; R. S. 2733; Act. of Mar. 4th, 1909, c. 314, §2; 35 Statutes, 1065.)

Furthermore, he has the right to maintain this action by virtue of the act of *August 24th, 1912*, c. 389, § 6; 37 Statutes, 555, set forth in part at page 6 of our original brief.

III.

Opposing counsel argues (pp. 8 to 12) that this action will not lie because the title to the office was not first tested by mandamus or quo warranto proceedings. This argument has been met heretofore because it goes to the question of jurisdiction and this jurisdictional question has been long since settled. In none of the cases heretofore cited on this point was there any ruling to such effect. No such requirement was exacted of Burnap in the recent case (*Burnap* vs. *United States*, *supra*). This is an action to recover the salary that would have been paid appellant but for his wrongful ouster. It is not an action to compel the restoration to the office, as was the

case of *Arant* vs. *Lane*, 249 U. S. 367, cited by opposing counsel. There is a wide difference between these two cases, as was pointed out in our original brief. Of course, appellant cannot recover the salary unless the court concludes that he was deprived thereof in violation of law. Appellant has shown that he had the title to the office and that he was removed therefrom in violation of the laws of Congress, and thereby lost the salary attached to the office. It cannot therefore be argued that the matter of title is the question before the court. If it should be held that Norris was wrongfully removed, then there could be no question of title, as he never lost title to the office in question. It is the consequent loss of salary that is involved here; not the restoration of the title. This question is one of legal right into which the exercise of "judicial discretion" or the application of "equitable principles" do not enter (see *Arant* vs. *United States*, *supra*).

The objection now raised by opposing counsel that a discharged employee must first sue out a writ of mandamus or proceed by way of *quo warranto*, was expressly raised in the case of *Tucker* vs. *City of Boston*, 223 Mass. 478, and squarely overruled.

IV.

The record shows (amended Finding II) that following Norris' restoration to office, his subsequent acquittal, and second removal, an attempt was made by the Assistant Secretary of the Treasury to abolish his position. No one was appointed to the "new office" created for Norris after the attempted abolition thereof, and so it cannot

be said that the salary of his office has been paid to another incumbent. At the bottom of page 4, defendant's brief, it is inconsistently argued that Norris' place was filled by another who drew the salary during the period for which appellant makes this claim, and yet that this office was abolished. There is nothing in the record to show that any attempt was ever made to fill the new office created for Norris. Of course, if this "new office" was abolished, no other officer could have received the salary thereof, as there was none paid. This situation affords a further reason for holding that *quo warranto* proceedings would not lie because there was no incumbent of the office to proceed against.

V.

Opposing counsel makes the point (pp. 12 and 13) that appellant, by laches, has lost the right of action despite the six years' statute of limitations. Norris was removed February 20th, 1913, and exactly one year thereafter, through his own efforts, was reinstated and given a new office by the Secretary, a new oath of office being taken March 5th, 1914. The Assistant Secretary, on April 25th, 1914, acquitted Norris of the charges, but directed his second removal and the abolition of the new office, and declared him eligible for reinstatement within one year, or until April 25th, 1915. In that year appellant requested reinstatement on two occasions at least, but was not successful. He filed his petition in the Court of Claims, May 23rd, 1916 (R., top of page 1).

We submit that there is no laches here and that the statute gave appellant six years in which to sue, and he did sue thirteen months after it became apparent that he would not be reinstated.

VI.

On pages 13 to 20, opposing counsel contends that the Assistant Secretary had the power to remove the appellant. As we have stated at pages [illegible] the power of appointment and removal lies in the Secretary alone. The head of the Department is the sole appointing and the sole removing power (Articles 1370, 1385, Customs Laws and Regulations of 1908; see also *Burnap* vs. *United States*, *supra*). Opposing counsel argues that Section 245, Revised Statutes, authorized the Secretary of the Treasury to assign such duties to his assistants as he saw fit and proper. We find no quarrel with this. The fact remains that the Secretary expressly reserved to himself the power of removal of subordinate customs officers (Article 1385, Customs Laws and Regulations of 1908). The power of removal was not one of the powers so delegated. The cases cited by opposing counsel, on pages 14 and 15, all deal with routine duties, and are, therefore, inapplicable to the question before this Court.

VII.

Opposing counsel's argument, on pages 21, 22 and 23, to the effect that Norris cannot recover because the salary of his office was paid to another, is clearly beside the point for the reason that the record convincingly shows that Norris'

"new office," which was never lawfully abolished, was not filled by another. The mere fact that there were thirty-three positions provided for the office of inspector in the District of Maryland does not raise a presumption that such offices were all filled at the time of the reorganization of the customs service in 1913. In fact, reference to the official treasury register of employees for that period shows that there were several deaths, resignations or transfers in the office of inspector of customs for the District of Maryland. As a matter of fact, the number of positions of inspector for the District of Maryland has varied each year. For the fiscal year ending June 30, 1921, the Secretary of the Treasury estimated for thirty-eight inspectors for this district (see House Doc. 459, 66th Congress, 2nd session, at page 15). In our original brief, page 16, a number of cases are cited in which it was held that an employee who is discharged wrongfully could recover the salary of his office even though the same had been paid to another during this period of wrongful removal.

Conclusion.

Wherefore, we submit that claimant is entitled to a judgment of reversal with a direction for the entry of judgment for the amount sued for.

Respectfully submitted,

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